

# The Protection of Confidential News Sources: Enhancing the Utility of Ohio's Shield Law

## I. INTRODUCTION

Recent years have witnessed an increase in the number of conflicts that involve news media and various judicial proceedings. With recurring frequency, parties have sought to compel disclosure of a newsgatherer's anonymous sources and confidential information. In these situations, reporters have resorted to the use of the first amendment and the invocation of appropriate state privilege statutes known as "shield laws" or "newsmen's privilege statutes" to withhold information that might identify an informant.<sup>1</sup> This privilege is valuable because when the newsgatherer protects a source of news, he increases the media's ability to acquire valuable information not otherwise obtainable.<sup>2</sup>

A reporter's privilege premised on constitutional grounds, however, has been severely curtailed;<sup>3</sup> any attempt to protect confidential sources and information with the use of the first amendment is uncertain, at best. Consequently, reporters find that state shield laws afford the greatest protection of their informants, though state legislatures have drafted these statutes with varying degrees of expertise,<sup>4</sup> and courts have interpreted shield laws in many diverse ways.<sup>5</sup>

This Comment examines the present ability of reporters to avoid compelled disclosures of news sources and information. This examination includes a discussion of the ineffective first amendment protection possessed by newsmen;<sup>6</sup> a review of the judicial treatment of other states' newsmen privilege statutes and the shortcomings of some of those statutes;<sup>7</sup> and recommendations for the revision of the Ohio Shield Law to assure its increased strength and consistent application in the future.<sup>8</sup>

## II. A NEWSGATHERER'S CONSTITUTIONAL PRIVILEGE

Newsgatherers attempting to remove confidential sources and information from judicial scrutiny invariably raise the issue of a privilege created by the freedom of the press clause of the first amendment of the United States Constitution.<sup>9</sup> Indeed, some courts have specifically stated that any such

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1. See text accompanying notes 53-136 *infra*.

2. See text accompanying notes 60-61 *infra*.

3. See text accompanying notes 9-52 *infra*.

4. See note 57 and accompanying text *infra*.

5. See text accompanying notes 63-68 *infra*.

6. See text accompanying notes 9-52 *infra*.

7. See text accompanying notes 53-136 *infra*.

8. See text accompanying notes 153-59 *infra*.

9. U.S. CONST. amend. I: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

privilege does emanate from the first amendment.<sup>10</sup> This privilege, framed within constitutional terms, was first asserted in the case of *Garland v. Torre*.<sup>11</sup> Since its initial assertion, the first amendment argument has met with limited success.

Typically, the newsgatherer claims that an effective press requires the protection of confidential sources and material to assure the free flow of information intended by the first amendment.<sup>12</sup> For the most part, courts recognize that the compelled disclosure of a journalist's sources and information may tend to impair a reporter's newsgathering capability.<sup>13</sup> Other courts, however, have preferred to characterize such impairment as "speculative"<sup>14</sup> or "indirect."<sup>15</sup>

Through the years, courts have wrestled with the alleged existence of a "newsman's privilege" arising from the first amendment. Without exception, these same courts have held that the first amendment's guarantee of freedom of the press is not absolute, particularly when considered in connection with a defendant's fifth amendment<sup>16</sup> right to due process and sixth amendment<sup>17</sup> right to compulsory process.<sup>18</sup> The vast majority of cases have held that neither the United States Constitution nor the constitutions of the various states grant any sort of a newsgatherer's testimonial privilege.<sup>19</sup> Further, those courts that have failed to rule out the possibility of a first amendment testimonial privilege have nevertheless produced the same result by holding that nothing within those constitutions would prohibit a judicial proceeding from compelling a news reporter to disclose a confidential source.<sup>20</sup>

Despite a finding that newsgatherers possess no first amendment privilege to withhold the identity of news sources, courts have been reluctant to

10. *Branzburg v. Hayes*, 408 U.S. 665, 679-80 (1972); *Reporters Comm. v. ATT*, 593 F.2d 1030 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 949 (1979); *Anderson v. Nixon*, 444 F. Supp. 1195, 1198 (D.D.C. 1978); *United States v. Liddy*, 354 F. Supp. 208, 211, 214 (D.D.C. 1972). "What is involved here is the right of the press to gather and publish, and that of the public to receive news from widespread, diverse and oftentimes confidential sources." *Democratic Nat'l Comm. v. McCord*, 356 F. Supp. 1394, 1396 (D.D.C. 1973).

11. 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958).

12. *See, e.g.*, *Branzburg v. Hayes*, 408 U.S. 665, 679-80 (1972). *But see* *CBS, Inc. v. Superior Court*, 85 Cal. App. 3d 241, 250-51, 149 Cal. Rptr. 421, 426 (1978) (the newsgatherer listed three press functions that would be impaired by compelled disclosure). *See also* Blasi, *The Newsman's Privilege: An Empirical Study*, 70 MICH. L. REV. 229 (1971).

13. *See, e.g.*, *Garland v. Torre*, 259 F.2d 545, 548 (2d Cir. 1958); *Wolf v. People*, 69 Misc. 2d 256, 258, 329 N.Y.S.2d 291, 294 (Sup. Ct.), *aff'd*, 39 A.D.2d 864, 333 N.Y.S.2d 299 (1972).

14. *Branzburg v. Hayes*, 408 U.S. 665, 694 (1972).

15. *Farr v. Superior Court*, 22 Cal. App. 3d 60, 72, 99 Cal. Rptr. 342, 350 (1971), *cert. denied*, 409 U.S. 1011 (1972).

16. U.S. CONST. amend. V: "No person shall be held to answer for a capital, or otherwise infamous crime, . . . nor be deprived of life, liberty, or property, without due process of law . . . ."

17. U.S. CONST. amend. VI: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor . . . ."

18. *See, e.g.*, *Garland v. Torre*, 259 F.2d 545, 549 (2d Cir. 1958); *Wolf v. People*, 69 Misc. 2d 256, 258, 329 N.Y.S.2d 291, 294 (Sup. Ct.), *aff'd*, 39 A.D.2d 864, 333 N.Y.S.2d 299 (1972).

19. *See In re Pappas*, 358 Mass. 604, 266 N.E.2d 297 (1971), *aff'd*, 408 U.S. 665 (1972); *In re Dan*, 80 Misc. 2d 399, 363 N.Y.S.2d 493 (Sup. Ct. 1975); *State v. Buchanan*, 250 Or. 244, 436 P.2d 729, *cert. denied*, 392 U.S. 905 (1968); *In re Taylor*, 412 Pa. 32, 193 A.2d 181 (1963).

20. *In re Grand Jury*, January, 1969, 315 F. Supp. 681 (D. Md. 1970); *Lightman v. State*, 15 Md. App. 713, 294 A.2d 149 (1972).

accede to a party's demand for the disclosure of a reporter's confidential source.<sup>21</sup> Consequently, courts engage in an informal balancing of a party's interest in the compelled testimony against any impairment of the first amendment that results from such compelled testimony. *Garland v. Torre*<sup>22</sup> first initiated this balancing process. The *Garland* court held that a plaintiff's good faith request for information that was crucial to preparation for trial was superior to the news reporter's allegation of first amendment impairment.<sup>23</sup> Use of this balancing process was tantamount to a grant of an informal, conditional privilege. Nevertheless, the *Garland* court refused to "recognize such a privilege in the absence of a statute creating one."<sup>24</sup>

#### A. *Branzburg v. Hayes*

For many years, the Second Circuit's *Garland v. Torre* decision remained the authority, and other courts employed its balancing technique with a variety of results. In 1972 the case of *Branzburg v. Hayes*<sup>25</sup> was heard by the United States Supreme Court. Presumably, *Branzburg* would lay to rest the issue of a news reporter's first amendment privilege.<sup>26</sup>

In *Branzburg* each reporter had been subpoenaed by a grand jury and ordered to divulge the identity of confidential sources. Each of their refusals to comply with the requested disclosures was accompanied by an assertion of a conditional first amendment privilege, which, unlike an absolute privilege, would require a reporter to divulge confidential material only after a sufficient demonstration of a compelling need for the information.<sup>27</sup> The Supreme Court refused to recognize such a constitutional privilege.<sup>28</sup>

Of primary concern to the Court was the importance of the grand jury to the criminal system.<sup>29</sup> Conceivably, the denial of information such as the

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21. The court in *Cervantes v. Time*, 464 F.2d 986 (8th Cir. 1972), stated:

We are aware of the prior cases holding that the First Amendment does not grant to reporters a testimonial privilege to withhold news sources. But to routinely grant motions seeking compulsory disclosure of anonymous news sources without first inquiring into the substance of a libel allegation would utterly emasculate the fundamental principles that underlay the line of cases articulating the constitutional restrictions to be engrafted upon the enforcement of State libel laws.

*Id.* at 992-93.

22. 259 F.2d 545, 548-50 (2d Cir. 1958).

23. *Id.* at 549-551. In *Garland v. Torre*, the plaintiff's request for the compelled disclosure of the source was particularly persuasive because the plaintiff had unsuccessfully sought the identity of the source through a variety of other means, *id.* at 551, and the source's identity went "to the heart of the plaintiff's claim." *Id.* at 550.

24. *Id.*

25. 408 U.S. 665 (1972).

26. *Branzburg v. Hayes* was actually the consolidation of three cases granted certiorari on the issue of whether the first amendment permitted newsgatherers under a grand jury subpoena to refuse to disclose the identity of a confidential source: *Caldwell v. United States*, 434 F.2d 1081 (9th Cir.), *cert. granted*, 402 U.S. 942 (1970); *Branzburg v. Pount*, 461 S.W.2d 345 (Ky. Ct. App.), *cert. granted*, 402 U.S. 942 (1970); *In re Pappas*, 358 Mass. 604, 266 N.E.2d 297, *cert. granted*, 402 U.S. 942 (1970).

27. 408 U.S. 665, 702 (1972).

28. *Id.* at 702-06.

29. *Id.* at 686-88. "[T]he longstanding principle that 'the public . . . has a right to every man's evidence' . . . is particularly applicable to grand jury proceedings." *Id.* at 688 (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950)); *Blackmer v. United States*, 284 U.S. 421, 438 (1932); 8 J. WIGMORE, EVIDENCE § 2192 (McNaughton rev. ed. 1961).

identity of a news source could hamper the grand jury process. Moreover, the Constitution created only one express testimonial privilege: the privilege against self-incrimination embodied within the fifth amendment.<sup>30</sup>

The *Branzburg* court also acknowledged the administrative problems associated with the recognition of a privilege arising from the broad language of the first amendment.<sup>31</sup> Justice White, in his majority opinion, expressed particular wariness of the difficulty in establishing entitlement to the privilege and an appropriate procedure for its application.<sup>32</sup>

Despite the majority's denial of a testimonial privilege, Justice White's opinion seems to indicate that a reporter's protection of confidential sources retains some first amendment protection: "[N]ews gathering is not without its First Amendment protections. . . . Grand juries are subject to judicial control and subpoenas to motions to quash. We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth."<sup>33</sup> A consideration of post-*Branzburg* decisions demonstrates the failure of *Branzburg* to resolve the status of a newsgatherer's constitutional privilege.

### B. *Post-Branzburg Decisions*

Because *Branzburg* was a five to four decision,<sup>34</sup> commentators have recognized the significance of Justice Powell's concurring opinion.<sup>35</sup> Justice Powell stressed that the holding should be narrowly applied to instances in which reporters are subpoenaed before grand juries.<sup>36</sup> Furthermore, his concurrence advocated the continued use of an informal balancing of the interest of freedom of the press, on the one hand, with the interest of acquiring relevant evidence on the other.<sup>37</sup>

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30. 408 U.S. 665, 689-90 (1972).

31. *Id.* at 703-06.

32. *Id.*

33. *Id.* at 707-08.

34. Justice White's majority opinion was joined by Chief Justice Burger and Justices Blackmun, Rehnquist, and Powell. Justice Powell added a brief concurrence "to emphasize . . . the limited nature of the Court's holding." *Id.* at 709.

35. See, e.g., Comment, *The First Amendment Newsman's Privilege: From Branzburg to Farber*, 10 SETON HALL L. REV. 333, 350 (1979).

36. 408 U.S. 665, 709 (1972).

37. Justice Powell said:

As indicated in the concluding portion of the opinion, the Court states that no harassment of newsmen will be tolerated. If a newsman believes that the grand jury investigation is not being conducted in good faith he is not without remedy. Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered. The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.

In short, the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection.

408 U.S. 665, 708-10 (1972) (Powell, J., concurring).

Post-*Branzburg* courts reflect varying interpretations of the case. Many courts have held that *Branzburg* stood for the proposition that the first amendment creates no newsperson's privilege to protect sources.<sup>38</sup> But much as Justice White had been in his majority opinion,<sup>39</sup> these same courts have been unwilling to leave a newsgatherer without any semblance of first amendment protection. The first amendment protection affords the newsperson the ability to refrain from divulging confidential sources when such a request is not for a legitimate purpose.<sup>40</sup> Legitimacy may depend upon the necessity and relevance of the identity of the news source. Thus, even jurisdictions that have denied a first amendment testimonial privilege have seen fit to employ a balancing process that turns on the perceived legitimacy of the demand for compelled disclosure.<sup>41</sup>

Courts have uniformly held that no absolute testimonial privilege arises under the first amendment.<sup>42</sup> However, many jurisdictions have construed *Branzburg* as having established a conditional or qualified privilege.<sup>43</sup> Decisions expressly recognizing the existence of a conditional privilege within the first amendment have described their weighing process. Using Powell's concurring opinion<sup>44</sup> to support their process, those courts have promulgated a case-by-case system that balances the competing rights of a party seeking desired evidence and the rights of a reporter attempting to protect a news source.<sup>45</sup>

Neither the defendant's rights nor the newsgatherer's rights are "entitled to per se precedence."<sup>46</sup> The judiciary's goal is to promote the freedom of the press subject to the importance of a fair trial for a criminal defendant or a civil party's need for evidence. The reconciliation of these competing interests is to be accomplished by minimum interference with the rights of the parties.<sup>47</sup>

The elements used in determining the existence of a conditional first amendment privilege have varied only slightly from decision to decision. The two criteria common to the bulk of courts employing a balancing process are

38. *United States v. Liddy*, 354 F. Supp. 208 (D.D.C. 1972); *In re Tierney*, 328 So. 2d 40 (Fla. Ct. App. 1976); *Caldero v. Tribune Publishing Co.*, 98 Idaho 288, 562 P.2d 791, cert. denied, 434 U.S. 930 (1977); *Dow Jones & Co. v. Superior Court*, 364 Mass. 317, 303 N.E.2d 847 (1973); *In re Farber*, 78 N.J. 259, 394 A.2d 330, cert. denied, 439 U.S. 997 (1978).

39. 408 U.S. 665, 707-08 (1972).

40. See, e.g., *In re Lewis*, 501 F.2d 418 (9th Cir. 1974); *In re Farber*, 78 N.J. 259, 394 A.2d 330 (1978).

41. See, e.g., *In re Farber*, 78 N.J. 259, 267-68, 394 A.2d 330, 334 (1978).

42. See, e.g., *Riley v. City of Chester*, 612 F.2d 708, 714 (3d Cir. 1979).

43. *Riley v. City of Chester*, 612 F.2d 708 (3d Cir. 1979); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977); *Gulliver's Periodicals, Ltd. v. Chas. Levy Circulating Co.*, 455 F. Supp. 1197 (N.D. Ill. 1978); *Loadholtz v. Fields*, 389 F. Supp. 1299 (M.D. Fla. 1975); *Democratic Nat'l Comm. v. McCord*, 356 F. Supp. 1394 (D.D.C. 1973); *Rosato v. Superior Court*, 51 Cal. App. 3d 190, 124 Cal. Rptr. 427 (1975), cert. denied, 427 U.S. 912 (1976); *Winegard v. Oxberger*, 258 N.W.2d 847 (Iowa Sup. Ct. 1977), cert. denied, 436 U.S. 905 (1978).

44. "The balance of these vital constitutional and societal interests on a case-by-case basis accords with the traditional way of adjudicating such questions." 408 U.S. 665, 710 (1972) (Powell, J., concurring).

45. *Altomose Constr. v. Building and Constr. Trades Council*, 443 F. Supp. 489, 491 (E.D. Pa. 1977); *CBS, Inc. v. Superior Court*, 85 Cal. App. 3d 241, 252, 149 Cal. Rptr. 421, 427 (1978).

46. *CBS, Inc. v. Superior Court*, 85 Cal. App. 3d 241, 252, 149 Cal. Rptr. 421, 427 (1978).

47. *Id.*

the relevancy of the testimony and the existence of a compelling state interest in obtaining that testimony.<sup>48</sup>

Different judicial proceedings call for subtle shifts of weight in the balancing process. When a request for a reporter's source occurs in the context of a grand jury investigation, courts recognize a compelling need for the evidence.<sup>49</sup> Presumably, a state's interests are more compelling within the grand jury system, which seeks to investigate allegations of crime and requires greater freedom in its inquiry. States' interests in the acquisition of a reporter's evidence are deemed more compelling in criminal actions than in civil actions;<sup>50</sup> conversely, the public's interest in the non-disclosure of a news-gatherer's source in a civil case will more often outweigh the private interest that seeks its disclosure.<sup>51</sup>

Post-*Branzburg* decisions are marked by their divergent reasoning; *Branzburg v. Hayes* has failed to resolve the issue of a reporter's right to protect the confidentiality of sources and material. The majority opinion in *Branzburg* expressly accords state legislatures the authority to adopt a statutory newsgatherer's privilege.<sup>52</sup> It is through this type of legislation that newsgatherers are gaining greater protection of their confidential material.

### III. A NEWSGATHERER'S STATUTORY PRIVILEGE

Although apparently denied an express first amendment reporter's privilege, journalists are not without legal protection for their confidential sources and material. The Supreme Court indicated that a newsgatherer's privilege may arise through state court interpretation of state constitutions, the enactment of a federal shield law, or the enactment of state shield laws.<sup>53</sup>

Because of the great similarity between most state constitutions and their federal counterpart, few state courts have availed themselves of *Branzburg's* invitation to interpret their constitution as having created a newsgatherer's

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48. *Riley v. City of Chester*, 612 F.2d 708 (3d Cir. 1979); *Baker v. F & F Inv.*, 470 F.2d 778 (2d Cir. 1972); *Gulliver's Periodicals, Ltd. v. Chas. Levy Circulating Co.*, 455 F. Supp. 1197 (N.D. Ill. 1978); *Hammarley v. Superior Court*, 89 Cal. App. 3d 388, 153 Cal. Rptr. 608 (1979); *Rosato v. Superior Court*, 51 Cal. App. 3d 190, 124 Cal. Rptr. 427 (1975). *But see* *Miller v. Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir. 1980); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977); *Altemose Constr. v. Building and Constr. Trades Council*, 443 F. Supp. 489 (E.D. Pa. 1977); *Democratic Nat'l Comm. v. McCord*, 356 F. Supp. 1394 (D.D.C. 1973) (requiring the party seeking disclosure to exhaust other means available).

49. *Farr v. Pitchess*, 522 F.2d 464, 468 (9th Cir. 1975); *Gulliver's Periodicals, Ltd. v. Chas. Levy Circulating Co.*, 455 F. Supp. 1197, 1201 (N.D. Ill. 1978). *But cf.*, *In re Farber*, 78 N.J. 259, 268-69, 394 A.2d 330, 334 (1978) (need for evidence is at least as compelling in criminal trial as in grand jury proceeding).

50. *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 725 (5th Cir. 1980), *cert. denied*, 101 S. Ct. 1759 (1981); *Reporters Comm. v. AT&T*, 593 F.2d 1030, 1053 (D.D.C. 1978); *Baker v. F & F Inv.*, 470 F.2d 778, 784 (2d Cir. 1972); *Altemose Constr. v. Building and Constr. Trades Council*, 443 F. Supp. 489, 491 (E.D. Pa. 1977); *Loadholtz v. Fields*, 389 F. Supp. 1299, 1301 (M.D. Fla. 1975); *Dow Jones & Co. v. Superior Court*, 364 Mass. 317, 319, 303 N.E.2d 847, 849 (1973).

51. *See* cases cited in note 50 *supra*.

52. 408 U.S. 665, 706 (1972).

53. *Id.*

privilege.<sup>54</sup> Inarguably, common law provided no such privilege.<sup>55</sup> As a result of this void, state privilege statutes have become the most effective means of permitting a news reporter to retain the confidentiality of his sources and certain material. In fact, the *Branzburg* decision has spawned a surge in the number of state shield laws. At the time of *Branzburg v. Hayes*, seventeen states had news reporter privilege statutes in effect;<sup>56</sup> now, a total of twenty-six states have similar laws in operation.<sup>57</sup>

#### A. The Construction of State Shield Laws

State legislative efforts appear to be a natural and appropriate vehicle for formulation of the scope of statutes such as reporter shield laws. The notion of a news reporter's privilege is a new issue; accordingly, it is more a part of "social policy" than "fundamental principle."<sup>58</sup> Additionally, legislative bodies possess a greater ability to marshal empirical studies and "factfinding resources" in a quest for an effective shield law.<sup>59</sup>

Once a state legislature enacts a statutory testimonial privilege for news-gatherers, it becomes the role of the courts to interpret and implement the intent of the lawmakers. Any enactment of a testimonial privilege is by definition an exception to the general rule requiring disclosure of subpoenaed information, and the affirmative act of adopting a newsperson's privilege serves to make a strong statement for a public policy of granting the greatest privilege possible within the strictures of the federal and state constitutions.<sup>60</sup>

The obvious statutory intent is to encourage the divulgence of news by informants who might otherwise hesitate to disclose matters of public import for fear of unfavorable publicity or the possibility of retribution resulting from their being

54. But see Opinion of the Justices, 373 A.2d 644 (N.H. 1977) (state constitution created a qualified privilege).

55. E.g., *Branzburg v. Hayes*, 408 U.S. 665, 685 (1972); *United States v. Liddy*, 354 F. Supp. 208, 214 (D.D.C. 1972); *Adams v. Associated Press*, 46 F.R.D. 439, 440 (S.D. Tex. 1969); *Brewster v. Boston Herald-Traveler Corp.*, 20 F.R.D. 416, 417 (D.C. Mass. 1957); *Rosenberg v. Carroll*, 99 F. Supp. 629 (S.D.N.Y. 1951).

56. *Branzburg v. Hayes*, 408 U.S. 665, 689 n.27 (1972) (Alabama, Alaska, Arizona, Arkansas, California, Indiana, Kentucky, Louisiana, Maryland, Michigan, Montana, Nevada, New Jersey, New Mexico, New York, Ohio, Pennsylvania).

57. ALA. CODE § 12-21-142 (1975); ALASKA STAT. § 09.25 150 (1973); ARIZ. REV. STAT. ANN. § 12-2237 (Supp. 1980); ARK. STAT. ANN. § 43-917 (1977); CAL. EVID. CODE § 1070 (West Supp. 1980); DEL. CODE ANN. tit. 10, §§ 4320-4326 (1975); ILL. ANN. STAT. ch. 51, §§ 111-119 (Smith-Hurd Supp. 1980); IND. CODE ANN. § 34-3-5-1 (Burns Supp. 1980); KY. REV. STAT. ANN. § 421.100 (Baldwin 1972); LA. REV. STAT. ANN. §§ 45.1451-1454 (West Supp. 1980); MD. CTS. & JUD. PROC. CODE ANN. § 9-112 (1980); MICH. STAT. ANN. § 28.945(1) (1978); MINN. STAT. ANN. §§ 595.021-.025 (West Supp. 1980); MONT. REV. CODES ANN. § 93.601-2 (Supp. 1977); NEB. REV. STAT. §§ 20.144-.147 (1977); NEV. REV. STAT. § 49.275 (1979); N.J. STAT. ANN. §§ 2A:84A-21, to -21.9 (West Supp. 1980); N.M. STAT. ANN. § 38-6-7 (Supp. 1981); N.Y. CIV. RIGHTS LAW § 79-h (McKinney 1976); N.D. CENT. CODE § 31-01-06.2 (1976); OHIO REV. CODE ANN. § 2739.12 (Page 1954); OHIO REV. CODE ANN. § 2739.04 (Page Supp. 1980); OKLA. STAT. ANN. tit. 12, § 2506 (West 1980); OR. REV. STAT. §§ 44.510-.540 (1979); 42 PA. CONS. STAT. ANN. § 5942 (Purdon 1980); R.I. GEN. LAWS §§ 9-19.1-1 to -3 (Supp. 1980); TENN. CODE ANN. § 24-1-208 (1980).

58. Edelstein and LoBue, *Journalist's Privilege and the Criminal Defendant*, 47 FORDHAM L. REV. 913, 922 (1979).

59. *Id.* at 923.

60. E.g., *In re Cepeda*, 233 F. Supp. 465, 470 (S.D.N.Y. 1964); *Hammarley v. Superior Court*, 89 Cal. App. 3d 388, 399, 153 Cal. Rptr. 608, 614 (1979); *In re Farber*, 78 N.J. 259, 270, 394 A.2d 330, 335 (1978).

revealed as the source of a particular news item. In so providing, our statute supports the basic right of the public to be informed by permitting a newspaper reporter to maintain the confidentiality of his news sources.<sup>61</sup>

Indeed, the enactment of a statutory privilege indicates that the legislature believes the benefit provided outweighs its administrative difficulties in judicial proceedings.<sup>62</sup>

Nevertheless, a shield law does not always encounter broad and accommodating application by a court. The common law provided for no such testimonial privilege.<sup>63</sup> Privileges in derogation of the common law are strictly construed.<sup>64</sup> Some courts are unwilling to infer that the state legislature intended an alteration of the common law principle greater than is expressly indicated in the statute itself.<sup>65</sup> Additionally, other courts employ a strict construction of shield laws because the privilege is a type based on a confidential relationship.<sup>66</sup>

At the other end of the continuum are jurisdictions willing to give a statutory newsperson's privilege wide applicability and effect by construing its terms broadly.<sup>67</sup> These courts believe that a liberal construction serves to facilitate both the free flow of information and the protection of the public's interest in newsgathering that were envisioned by the state's lawmaking body.<sup>68</sup>

Obviously, such divergent opinions relating to the breadth of construction greatly affect a shield law's scope and vitality. The employment of strict construction by a court generally makes the eventual denial of the statutory privilege a foregone conclusion. Consequently, the specificity of the statutory language becomes very important in assuring the implementation of a legislature's intent.

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61. *Dumez v. Houma Mun. Fire and Police Civil Serv. Bd.*, 341 So. 2d 1206, 1208 (La. Ct. App. 1976).

62. *See Beecroft v. Point Pleasant Print. and Pub. Co.*, 82 N.J. Super. 269, 273, 197 A.2d 416, 418 (1964).

63. *See* note 55 *supra*.

64. *E.g.*, *In re Cepeda*, 233 F. Supp. 465, 473 (S.D.N.Y. 1964); *State v. Donovan*, 129 N.J.L. 478, 486, 30 A.2d 421, 426 (1943). *But cf.* *Branzburg v. Pound*, 461 S.W.2d 345, 347 (Ky. Ct. App. 1970), *aff'd*, 408 U.S. 665 (1972) ("The rule that statutes in derogation of the common law should be strictly construed does not apply in Kentucky.")

65. *See* cases cited in note 64 *supra*.

66. *WBAI-FM v. Proskin*, 42 A.D.2d 5, 7, 344 N.Y.S.2d 393, 394 (1973); *Branzburg v. Pound*, 461 S.W.2d 345, 347 (Ky. Ct. App. 1970), *aff'd*, 408 U.S. 665 (1972).

67. *E.g.*, *Rosato v. Superior Court*, 51 Cal. App. 3d 190, 217, 124 Cal. Rptr. 427, 445 (1975); *In re Taylor*, 412 Pa. 32, 42, 193 A.2d 181, 185-86 (1963). The court of *In re Farber*, 78 N.J. 259, 394 A.2d 330 (1978), stated: We read the legislative intent in adopting this statute in its present form as seeking to protect the confidential sources of the press as well as information so obtained by reporters and other news media representatives to the greatest extent permitted by the Constitution of the United States and that of the State of New Jersey.

*Id.* at 270, 394 A.2d at 335.

68. *Rosato v. Superior Court*, 51 Cal. App. 3d 190, 217, 124 Cal. Rptr. 427, 445 (1975); *In re Taylor*, 412 Pa. 32, 42, 193 A.2d 181, 185-86 (1963).



## B. Scope of State Shield Laws

### 1. Nature of Material Protected

The most obvious distinction between various state statutes is the type of information that the shield law seeks to protect. Some statutes are written to preserve the confidentiality of a newsgatherer's source.<sup>69</sup> These laws permit a reporter to refuse to disclose the identity of a news informant when so requested at a judicial proceeding. Other reporter shield statutes provide for the confidentiality of certain information as well by allowing a journalist to refuse to divulge certain material acquired in the course of newsgathering.<sup>70</sup>

Generally, courts construing statutes that protect a newsgatherer's source of information have limited this protection to the identity of the informant.<sup>71</sup> Interpreting a New Jersey statute that provided for the protection of a reporter's source, the Supreme Court of New Jersey found that the means by which the information was transmitted to the reporter was not within the purview of the statute.<sup>72</sup> A California Court of Appeals, however, held that such a privilege could also be inferred to apply to any information that would tend to reveal the identity of the source.<sup>73</sup> In what may only be described as judicial legislation, the Supreme Court of Pennsylvania extended the Pennsylvania statutory privilege for journalists to documents, even though the statute's language encompassed only the identity of sources.<sup>74</sup>

Legislators granting the testimonial privilege to reporters for news information, as well as identity of sources, are sensitive to the inextricable intertwining<sup>75</sup> of news information and sources. Statutes granting a privilege to the information itself do so for two reasons. First, information will sometimes point to an obvious source, thus negating any protection of the informant.<sup>76</sup> Second, some information is received by newsgatherers with the understanding that it will never be divulged. Information of this type is used by a reporter for the purpose of obtaining "leads" in the pursuit of additional facts.<sup>77</sup> Un-

69. *E.g.*, ALA. CODE tit. 12 § 21-142 (1975); ARK. STAT. ANN. § 43-917 (1977); IND. CODE ANN. § 34-3-5-1 (Burns Supp. 1980); KY. REV. STAT. ANN. § 421.100 (Baldwin 1972); LA. REV. STAT. ANN. §§ 45.1451-.1454 (West Supp. 1980); MD. CTS. & JUD. PROC. CODE ANN. § 9-112 (1980); OHIO REV. CODE ANN. § 2739.12 (Page 1954); OHIO REV. CODE ANN. § 2739.04 (Page Supp. 1980); 42 PA. CONS. STAT. ANN. § 5942 (Purdon 1980).

70. *E.g.*, CAL. EVID. CODE § 1070 (West Supp. 1980); N.J. STAT. ANN. §§ 2A:84A-21 to -21.9 (West Supp. 1980); N.Y. CIV. RIGHTS LAW § 79-h (McKinney 1976).

71. *Branzburg v. Meigs*, 503 S.W.2d 748 (Ky. Ct. App. 1971), *aff'd sub nom. Branzburg v. Hayes*, 408 U.S. 665 (1972); *Branzburg v. Pound*, 461 S.W.2d 345 (Ky. Ct. App.), *cert. granted*, 402 U.S. 942 (1970); *Dumez v. Houma Mun. Fire and Police Civil Serv. Bd.*, 341 So. 2d 1206 (La. Ct. App. 1976); *Lightman v. State*, 15 Md. App. 713, 294 A.2d 149 (1972).

72. *State v. Donovan*, 129 N.J.L. 478, 487, 30 A.2d 421, 426 (1943).

73. *Rosato v. Superior Court*, 51 Cal. App. 3d 190, 218, 124 Cal. Rptr. 427, 445 (1975).

74. *In re Taylor*, 412 Pa. 32, 193 A.2d 181 (1963).

75. *Andrews v. Andreoli*, 92 Misc. 2d 410, 417, 400 N.Y.S.2d 442, 447 (Sup. Ct. 1977).

76. *In re Taylor*, 412 Pa. 32, 43, 193 A.2d 181, 186 (1963) (providing documents with names of sources deleted insufficient to protect identity).

77. *Hammarley v. Superior Court*, 89 Cal. App. 3d 388, 153 Cal. Rptr. 608 (1979) (the statutory privilege covered all information—not just that information that might tend to disclose the source. *Id.* at 397-98, 153 Cal. Rptr. at 612-13).

less shield laws protect this material, much valuable information may be withheld from reporters.

## 2. *Disseminated and Undisseminated Material*

A reporter's ability to claim protection of a statutory shield law may depend on whether the information has been incorporated within a publication or broadcast. When dealing with statutes that include protection for a reporter's information, the result may be ridiculous. For example, the New Jersey shield law purports to protect the confidentiality of a newsgatherer's sources, as well as "[a]ny news or information obtained in the course of pursuing his professional activities whether or not it is disseminated."<sup>78</sup> Its language purports to permit a newsgatherer to refuse to divulge subpoenaed information that has already been published or broadcast to the public at large.<sup>79</sup> This protection is nonsensical. Perhaps a more realistic interpretation would be that dissemination of certain material would not require the disclosure of all information concerning the same subject.<sup>80</sup>

Certain state shield laws that protect confidential sources extend such a privilege only when the information contributed by the informant has been printed or broadcast.<sup>81</sup> For example, a Kentucky statute has been interpreted to provide that the newsgatherer's privilege is not activated until the source's information is disseminated.<sup>82</sup> Statutes like these could produce inequitable or unforeseen results. Informants whose material is never used or whose information is in preparation for printing or broadcast would be without statutory protection. To insure more certain protection for his source, a newsgatherer would be racing to publish or broadcast. Stories involving a large amount of information culled from a number of confidential sources require special consideration. If the statutory prerequisite is strictly applied, the dissemination of one source's information would not entitle contributing sources to statutory protection.

The requirement that the information be disseminated for the source to gain protection places an unnecessary condition on the privilege. An informant provides a reporter with facts for that newsgatherer's use. In return, the informant asks for assurances that his identity will not be revealed. It is unimportant to that source that the information was never used in an article or

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78. N.J. STAT. ANN. 2A:84A-21(b) (1980).

79. Actual dissemination of the requested information generally constitutes a waiver. See text accompanying notes 112-20 *infra*.

80. See, e.g., CAL. EVID. CODE § 1070(c) (West Supp. 1980) (definition of "unpublished information").

81. E.g., ALA. CODE tit. 12 § 21-142 (1975) protects "the sources of any information procured or obtained by [a reporter] and published in the newspaper, broadcast by any broadcasting station, or televised by any television station."

82. *Branzburg v. Pount*, 461 S.W.2d 345, 348 (Ky. Ct. App. 1970), *aff'd*, 408 U.S. 665 (1972).

broadcast. Fortunately, a majority of the statutes that protect a source's identity have no requirement that the information be disseminated.<sup>83</sup>

### 3. Court Order Violations

Shield laws will not obstruct a court's attempt at determining the violator of a court order. In *Rosato v. Superior Court*<sup>84</sup> a portion of a grand jury transcript appeared in a newspaper prior to the trial, even though the trial court had ordered its contents sealed to prevent dissemination. In *Farr v. Superior Court*<sup>85</sup> the trial court had prohibited any party to the case from revealing testimony or evidence prior to the trial in an effort to avoid pre-trial publicity. Nevertheless, a reporter received copies of a witness' pre-testimony statement from one of the attorneys. In each instance, the journalists were ordered to identify the party who had violated the court order. In response to the court orders, the reporters asserted their statutory privilege.

The appellate court in each case held that a reporter may not invoke his statutory privilege during an investigation growing out of a violation of a court order.<sup>86</sup> Two compelling needs require the disclosure of a source despite an applicable statute. First, the court must be able to enforce its order prohibiting publicity and to sanction those court officers who disobey.<sup>87</sup> Second, the enforcement of a court order protects the public's interest in fair trials.<sup>88</sup>

### 4. Definitional Considerations

Any consideration of the scope of state shield laws necessarily includes a look at definitional problems.<sup>89</sup> A few states have wisely included within their law a definition section designed to assist a court in its determination of a news reporter's entitlement to the testimonial privilege.<sup>90</sup> Unfortunately, statutes like these are rare; a majority of the shield laws offer no definitions for their terms.

When an individual asserts the protection of these statutes, it may be difficult to decide whether he is a "professional journalist"<sup>91</sup> or whether the subject matter is "news"<sup>92</sup> within the meaning of the statute. A definition

83. *E.g.*, IND. CODE ANN. § 34-3-5-1 (Burns Supp. 1980) protects the source of any information procured or obtained in the course of his employment or representation . . . whether published or not published in the newspaper or periodical, or by the press association or wire service or broadcast or not broadcast by the radio station or television station by which he is employed.

84. 51 Cal. App. 3d 190, 124 Cal. Rptr. 427 (1975), *cert. denied*, 427 U.S. 912 (1976).

85. 22 Cal. App. 3d 60, 99 Cal. Rptr. 342 (1971), *cert. denied*, 409 U.S. 1011 (1972).

86. 51 Cal. App. 3d 190, 224, 124 Cal. Rptr. 427, 450 (1975); 22 Cal. App. 3d 60, 72, 99 Cal. Rptr. 342, 349 (1971).

87. *Farr v. Superior Court*, 22 Cal. App. 3d 60, 72, 99 Cal. Rptr. 342, 350 (1971).

88. *Id.*

89. *Branzburg v. Hayes*, 408 U.S. 665, 703-04 (1972).

90. *E.g.*, N.J. STAT. ANN. 2A:84A-21(a) (West Supp. 1980); N.Y. CIV. RIGHTS LAW 79-h(a) (McKinney 1976).

91. *People v. LeGrand*, 67 A.D.2d 446, 451, 415 N.Y.S.2d 252, 255 (1979).

92. *Wolf v. People*, 69 Misc. 2d 256, 260, 329 N.Y.S.2d 291, 296 (Sup. Ct. 1972), *aff'd*, 39 A.D.2d 864, 333 N.Y.S.2d 299 (1972).

section assists a court in divining a legislature's intent and increases the probability that its intent will be given proper effect.

### 5. News Reporters as Eyewitnesses

Newspersons find themselves outside the scope of a shield law when they observe an act firsthand, a result that has come about through judicial decision<sup>93</sup> and certain statutory language.<sup>94</sup> When a news reporter is an observer of an act or conduct, the newsman becomes the "source."<sup>95</sup> In cases in which the reporter is the only eyewitness, the public interest in law enforcement outweighs the burden placed on newsgatherers, and thus testimony regarding the acts they have observed is compelled.<sup>96</sup>

### 6. The Element of Confidentiality

State shield laws contemplate the protection of sources and information involved in the confidential transmittal of news from the source to the journalist. Quite logically, courts require an element of confidentiality to be present before they are willing to extend the statutory privilege.<sup>97</sup> If the source did not take measures to protect his identity or rely on a reporter's protection of his anonymity, the informant was apparently unconcerned with the disclosure of his identity, and no privilege should ensue. This appears to be a reasonable requirement; the problems arise when proceedings attempt to discern the presence or absence of the confidential relationship.

*Wolf v. People*<sup>98</sup> enumerated a two-part test that a newsgatherer must satisfy in order to receive protection under the New York shield law. First, the source must have given the information to a reporter with an understanding, express or implied, that the informant or the source would not be disclosed.<sup>99</sup> Second, the journalist must have received the information in the course of newsgathering.<sup>100</sup> Other New York courts have been quick to adopt the *Wolf* test.<sup>101</sup>

93. *Rosato v. Superior Court*, 51 Cal. App. 3d 190, 218, 124 Cal. Rptr. 427, 446 (1975); *Branzburg v. Pound*, 461 S.W.2d 345, 348 (Ky. Ct. App. 1970); *People v. DuPree*, 88 Misc. 2d 791, 796, 388 N.Y.S.2d 1000, 1003 (Sup. Ct. 1976); *In re Dan*, 80 Misc. 2d 399, 403, 363 N.Y.S.2d 493, 498 (Sup. Ct. 1975).

94. See, e.g., N.J. STAT. ANN. 2A:84A-21a(h) (West Supp. 1980) (definition of "in the course of pursuing his professional activities").

95. E.g., "When a newsman, by dint of his own investigative efforts, personally observes conduct constituting the commission of criminal activities . . . , the newsman, and not the persons observed, is the 'source' of the news or information in the sense contemplated by the statute." *Lightman v. State*, 15 Md. App. 713, 725, 294 A.2d 149, 156-57 (1972).

96. *In re Dan*, 80 Misc. 2d 399, 363 N.Y.S.2d 493 (Sup. Ct. 1975) (television reporter's observations in Attica prison during a riot not privileged).

97. E.g., *Andrews v. Andreoli*, 92 Misc. 2d 410, 419, 400 N.Y.S.2d 442, 448 (Sup. Ct. 1977); *In re Dan*, 80 Misc. 2d 399, 401, 363 N.Y.S.2d 493, 496-97 (Sup. Ct. 1975); *WBAI-FM v. Proskin*, 42 A.D.2d 5, 6-7, 344 N.Y.S.2d 393, 394 (Sup. Ct. 1973); *Wolf v. People*, 69 Misc. 2d 256, 260, 329 N.Y.S.2d 291, 296 (Sup. Ct. 1972).

98. 69 Misc. 2d 256, 329 N.Y.S.2d 291 (Sup. Ct. 1972).

99. *Id.* at 261, 329 N.Y.S.2d at 297.

100. *Id.*

101. *Andrews v. Andreoli*, 92 Misc. 2d 410, 418, 400 N.Y.S.2d 442, 447 (Sup. Ct. 1977); *Davis v. Davis*, 88 Misc. 2d 1, 3-4, 386 N.Y.S.2d 992, 994 (Fam. Ct. 1976); *People v. Marahan*, 81 Misc. 2d 637, 647, 368 N.Y.S.2d 685, 695 (Sup. Ct. 1975); *In re Dan*, 80 Misc. 2d 399, 401, 363 N.Y.S.2d 493, 496 (Sup. Ct. 1975).

*Andrews v. Andreoli*<sup>102</sup> further explained the meaning of an express or implied understanding of confidentiality. Under the *Andrews* requirements, both the source and the newsgatherer must have a common intent to preserve the anonymity of a source or information.<sup>103</sup> A news reporter may establish such a mutual intent by presenting preponderant evidence of an express agreement or circumstances that reasonably imply an unspoken agreement of confidentiality.<sup>104</sup> An unspoken, implied-in-fact understanding of confidentiality arises from the conduct of the reporter and the source, custom and usage, or other surrounding circumstances tending to indicate that an informant desires anonymity.<sup>105</sup> The second element of the *Wolf* test (reception of the information while in the process of newsgathering) indicates a presumption that material gained while not acting as a reporter lacks a confidential nature.<sup>106</sup>

### C. Waiver of the Statutory Privilege

Even if a newsgatherer successfully demonstrates that he is within the scope of a shield law, the party seeking disclosure may allege that the reporter has waived his statutory privilege. Courts view the shield laws as conferring a voluntary privilege on the journalist—not the source.<sup>107</sup> Consequently, the informant may not assert the shield law; only the newsgatherer can decide whether to utilize the privilege.<sup>108</sup> The courts, however, may decide that the asserted privilege has been waived. A waiver may occur, for example, when a defendant reporter asserts an affirmative defense of good faith or truth in a defamation action or when the source has been disclosed in some manner.

#### 1. Affirmative Defenses in Defamation Cases

The exercise of a statutory privilege often occurs within the context of a libel or defamation action. Typically, a defendant reporter will plead the affirmative defense of truth, lack of malice, fair comment, or good faith.<sup>109</sup> Upon the reporter's so pleading, a plaintiff will seek to discover the identity of the reporter's source. Disclosure of a journalist's source may assist the plaintiff's action in three respects.<sup>110</sup> First, examination of the source could show that the newsgatherer included information beyond that which was provided

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102. 92 Misc. 2d 410, 400 N.Y.S.2d 442 (Sup. Ct. 1977).

103. *Id.* at 418, 400 N.Y.S.2d at 447-48.

104. *Id.*

105. *Id.*

106. The question remains whether unsolicited information that was volunteered to a newsgatherer would be construed as having been obtained while in the process of newsgathering. This question was answered in the affirmative in *Davis v. Davis*, 88 Misc. 2d 1, 386 N.Y.S.2d 992 (Fam. Ct. 1976).

107. *E.g.*, *Lightman v. State*, 15 Md. App. 713, 724, 294 A.2d 149, 156 (1972); *Brogan v. Passaic Daily News*, 22 N.J. 139, 151, 123 A.2d 473, 480 (1956).

108. *Brogan v. Passaic Daily News*, 22 N.J. 139, 151, 123 A.2d 473, 480 (1956).

109. *E.g.*, *Mazzella v. Philadelphia Newspapers, Inc.*, 479 F. Supp. 523 (E.D.N.Y. 1979); *Beecroft v. Point Pleasant Print. and Pub. Co.*, 82 N.J. Super. 269, 197 A.2d 416 (1964); *Brogan v. Passaic Daily News*, 22 N.J. 139, 123 A.2d 473 (1956).

110. *See* cases cited in note 109 *supra*.

by the informant. Second, the identity of the source could distinguish the informant as a questionable source. Third, the plaintiff could contend that the journalist acted in bad faith by relying on an unreliable source without proper corroborative facts.

Judges are sensitive to the inequity of allowing a reporter to assert these affirmative defenses without providing the name of the source. Therefore, courts have held that the assertion of the affirmative defenses of fair comment, good faith, truth, and lack of malice in a libel case constitutes a waiver of a news reporter's statutory privilege.<sup>111</sup>

## 2. *Disclosure of Material*

Although some statutes require the dissemination of information to occur before the privilege is activated,<sup>112</sup> most jurisdictions are in general agreement that disclosure of a source of information constitutes a waiver of the statutory privilege.<sup>113</sup> In the words of a New York court: "The statute, therefore, cannot be used as a shield to protect that which has already been exposed to view."<sup>114</sup>

As noted above, the privilege may be wielded only by the reporter;<sup>115</sup> however, its waiver may be effected through disclosure of the identity of the source or information by either the informant or the journalist.<sup>116</sup> To ascertain whether there has been a waiver through disclosure, the extent of the disclosure is relevant. In *Saxton v. Arkansas Gazette Co.*<sup>117</sup> a reporter's voluntary, informal disclosure of the identity of a source to his editor and a deputy prosecuting attorney did not constitute a waiver.<sup>118</sup> However, a waiver of confidentiality does occur when the source testifies or consents to his identification as the source.<sup>119</sup>

An interesting issue arises in jurisdictions whose statutes provide for the confidentiality of information as well as of the identity of sources. Does a waiver through disclosure of information act as a waiver of the privilege concerning the identity of the source and vice versa? One court that has addressed this question indicated that the waivers of confidential information and sources through disclosure operate independently of one another.<sup>120</sup> In other words, the publishing of information obtained from a confidential

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111. *Id.*

112. See text accompanying notes 81-83 *supra*.

113. *E.g.*, *People v. Zagarino*, 97 Misc. 2d 181, 411 N.Y.S.2d 494 (Sup. Ct. 1978); *Andrews v. Andreoli*, 92 Misc. 2d 410, 400 N.Y.S.2d 442 (Sup. Ct. 1977); *In re Dan*, 80 Misc. 2d 399, 363 N.Y.S.2d 493 (Sup. Ct. 1975); *Wolf v. People*, 69 Misc. 2d 256, 329 N.Y.S.2d 291 (Sup. Ct. 1972); *In re Taylor*, 412 Pa. 32, 193 A.2d 181 (1963).

114. *People v. Wolf*, 39 A.D.2d 864, 864, 333 N.Y.S.2d 299, 301 (1972).

115. See text accompanying notes 107-08 *supra*.

116. See, *e.g.*, *Andrews v. Andreoli*, 92 Misc. 2d 410, 400 N.Y.S.2d 442 (Sup. Ct. 1977) (source, who had originally requested anonymity, identified himself to a special prosecutor as the individual who had spoken to the news reporter).

117. 264 Ark. 133, 569 S.W.2d 115 (1978).

118. *Id.* at 136-37, 569 S.W.2d at 117.

119. *People v. Zagarino*, 97 Misc. 2d 181, 411 N.Y.S.2d 494 (Sup. Ct. 1978).

120. *Andrews v. Andreoli*, 92 Misc. 2d 410, 419, 400 N.Y.S.2d 442, 448 (Sup. Ct. 1977).

source would not be held a waiver of a statutory ability to protect the anonymity of the informant.

The reasoning that underlies the concept of waiver through specific disclosure is consistent with the policy of a news reporter's privilege. It is unlikely that a journalist can demonstrate the injurious impact on his news-gathering processes caused by the compelled disclosure of sources or information whose disclosure has already occurred.

#### D. Implementation of the Statutory Privilege

At times, state shield laws may be difficult to implement. The existence of the statute evidences a state policy of granting journalists the greatest privilege possible within the requirements of the federal and state constitutions.<sup>121</sup> A statutory privilege is not an absolute exemption from the responsibility of providing relevant testimony.<sup>122</sup> It then becomes the role of the courts to translate the conditional privilege into a workable system.

Some jurisdictions treat the presence of a shield law as nothing more than an additional factor to consider in the weighing process.<sup>123</sup> Other courts effect greater protection for journalists by shifting the burden or instituting procedural safeguards. Legislative creation of a privilege shifts the burden to the party seeking to defeat the privilege.<sup>124</sup> The party seeking disclosure must demonstrate that the evidence requested is relevant, necessary, and not obtainable elsewhere.<sup>125</sup>

The New Jersey shield law<sup>126</sup> is an example of a statute expressly detailing procedural guidelines to ensure effective protection. New Jersey courts use two hearings to determine the extent of a journalist's privilege. Originally formulated by the Supreme Court of New Jersey in 1978,<sup>127</sup> this two-step process has since been codified.<sup>128</sup>

Upon the request by a criminal defendant that the newsgatherer disclose the identity of a source or information within his possession, a reporter is entitled to assert his statutory privilege. His assertion triggers a threshold hearing before the court, at which the news reporter is obliged to make a *prima facie* showing that he qualifies as a newsgatherer within the meaning of the statute and that the material was obtained while so engaged.<sup>129</sup> The defendant must demonstrate by a preponderance of the evidence that there is a reasonable probability that the requested material is relevant and necessary to

121. See text accompanying note 60 *supra*.

122. *E.g.*, *Dumez v. Houma Mun. Fire and Police Civil Serv. Bd.*, 341 So. 2d 1206, 1209 (La. Ct. App. 1976); *People v. Monroe*, 82 Misc. 2d 850, 856-57, 370 N.Y.S.2d 1007, 1013-14 (Sup. Ct. 1975).

123. See cases cited in note 122 *supra*.

124. *E.g.*, *Hammarley v. Superior Court*, 89 Cal. App. 3d 388, 399, 153 Cal. Rptr. 608, 614 (1979).

125. *Id.* It should be noted that these are the same criteria the newsmen in *Branzburg v. Hayes* asserted were required by a first amendment privilege. 408 U.S. 665, 679-80 (1972).

126. N.J. STAT. ANN. §§ 2A:84A-21 to -21.9 (West Supp. 1980).

127. *In re Farber*, 78 N.J. 259, 275-77, 394 A.2d 330, 338-39 (1978).

128. N.J. STAT. ANN. §§ 2A:84A-21 to -21.9 (West Supp. 1980).

129. *Id.* § 2A:84A-21.3(a).

a determination of guilt or innocence and that the subpoena is not overbroad or oppressive.<sup>130</sup> Furthermore, the defendant seeking enforcement of the subpoena must show that the desired information is not obtainable from a less intrusive source.<sup>131</sup> Alternatively, the defendant may show by clear and convincing evidence that the privilege has been waived.<sup>132</sup>

If the court finds that the defendant has met his burden of proof by demonstrating his need for the evidence, or by showing that the newsgatherer has waived his privilege, an *in camera* inspection and second hearing ensue.<sup>133</sup> Here, the requested material will be viewed. The *in camera* inspection involves the same criteria as the preliminary hearing (relevancy, materiality, necessity); however, the defendant must establish a more specific need for the material viewed. At the conclusion of the *in camera* inspection and arguments by both parties, the court will make its ruling and direct the disclosure of that information it finds to be admissible and sufficiently relevant, material, and necessary.<sup>134</sup> The decision of the trial court is subject to interlocutory appeal by either party.<sup>135</sup>

As the Supreme Court of New Jersey has observed, the hearings and *in camera* inspection act as "a preliminary step to determining whether, and if so to what extent, the statutory privilege must yield to the defendant's constitutional rights."<sup>136</sup> Procedures such as this one are a just balancing of a journalist's privilege and a party's right to evidence.

#### IV. THE OHIO SHIELD LAW

##### A. Current Status

Presently, two statutes comprise the Ohio Shield Law: Revised Code section 2739.12,<sup>137</sup> which relates to newspapers and press associations, and Revised Code section 2739.04,<sup>138</sup> which involves radio and television broad-

130. *Id.* § 2A:84A-21.

131. *Id.*

132. *Id.*

133. *Id.* § 2A:84A-21.4.

134. *Id.*

135. *Id.* § 2A:84A-21.6.

136. *In re Farber*, 78 N.J. 259, 275, 394 A.2d 330, 338 (1978).

137. OHIO REV. CODE ANN. § 2739.12 (Page 1954):

No person engaged in the work of, or connected with, or employed by any newspaper or any press association for the purpose of gathering, procuring, compiling, editing, disseminating, or publishing news shall be required to disclose the source of any information procured or obtained by such person in the course of his employment, in any legal proceeding, trial, or investigation before any court, grand jury, petit jury, or any officer thereof, before the presiding officer of any tribunal, or his agent, or before any commission, department, division, or bureau of this state, or before any county or municipal body, officer or committee thereof.

138. OHIO REV. CODE ANN. § 2739.04 (Page Supp. 1980):

No person engaged in the work of, or connected with, or employed by any noncommercial educational or commercial radio broadcasting station, or any noncommercial educational or commercial television broadcasting station, or network of such stations, for the purpose of gathering, procuring, compiling, editing, disseminating, publishing, or broadcasting news shall be required to disclose the source of any information procured or obtained by such person in the course of his



casting. Substantively, the protections they provide are identical, save for the section 2739.04 requirement that television and radio broadcasters maintain a record of information obtained from a source for six months after its broadcast. The Ohio Shield Law purports to protect only the source of news—not the information obtained. Like so many other state shield laws, the Ohio statutes are little more than general conferrals of a statutory privilege with no express language describing procedural applicability or scope of entitlement.

There are few cases to assist in the interpretation of the Ohio statutory privilege for newsmen; only four reported decisions involve its consideration.<sup>139</sup> The three earliest cases strictly construed the extent and application of the Ohio Shield Law.

*Deltec, Inc. v. Dun & Bradstreet*<sup>140</sup> demonstrated the limited number of journalistic entities that are entitled to section 2739.12 protection. The defendant, who published for subscribers a bi-monthly report relating to business concerns, was found not to have been within the confines of section 2739.12.<sup>141</sup> The United States District Court for the Northern District of Ohio held that the shield law's protection was limited to newspapers and press associations, which did not include periodicals or magazines.<sup>142</sup>

*Stokes v. Lorain Journal Co.*<sup>143</sup> involved a libel action. In compelling disclosure of a confidential informant by the newsgatherers, the court did not require the party seeking disclosure to prove either (1) that the newspaper possessed the evidence or (2) that the evidence would be admissible in court. It merely required the plaintiff to make a good faith showing that he believed the compelled disclosure would lead to admissible evidence.<sup>144</sup> This require-

employment, in any legal proceeding, trial, or investigation before any court, grand jury, petit jury, or any officer thereof, before the presiding officer of any tribunal, or his agent, or before any commission, department, division, or bureau of this state, or before any county or municipal body, officer, or committee thereof.

Every noncommercial educational or commercial radio broadcasting station, and every noncommercial educational or commercial television broadcasting station shall maintain for a period of six months from the date of its broadcast thereof, a record of those statements of information the source of which was procured or obtained by persons employed by the station in gathering, producing, compiling, editing, disseminating, publishing, or broadcasting news.

As used in this section:

(A) "Record" includes a tape, disc, script, or any other item or document that sets forth the content of the statements that are required by this section to be recorded.

(B) "Noncommercial educational television or radio broadcasting station" means a television or radio broadcast station that is licensed by the federal communications commission as a noncommercial educational radio or television broadcast station, transmits only noncommercial programs for educational purposes, and is owned and operated by:

- (1) A public agency or institution or nonprofit private foundation, corporation, or association;
- (2) A municipal corporation.

139. *Deltec, Inc. v. Dun & Bradstreet, Inc.*, 187 F. Supp. 788 (N.D. Ohio 1960); *In re McAuley*, 63 Ohio App. 2d 5, 408 N.E.2d 697 (1979); *Forest Hills Utility Co. v. City of Heath*, 66 Ohio Op. 2d 66, 302 N.E.2d 593 (C.P. 1973); *Stokes v. Lorain Journal Co.*, 55 Ohio Op. 2d 363, 266 N.E.2d 857 (C.P. 1970).

140. 187 F. Supp. 788 (N.D. Ohio 1960).

141. *Id.* at 790.

142. The court held that a magazine or periodical was a newspaper within the meaning of § 2739.11 O.R.C.; however, the § 2739.11 O.R.C. definition is specifically limited to §§ 2739.13–.18. *Id.* at 789.

143. 55 Ohio Op. 2d 363, 266 N.E.2d 857 (C.P. 1970).

144. *Id.* at 369, 266 N.E.2d at 869.

ment was a relatively light burden of proof to justify compelled disclosure despite the existence of a statutory privilege—particularly in a civil action.

Recognizing that the purpose of section 2739.12 was to encourage the flow of news,<sup>145</sup> the court in *Forest Hills Co. v. City of Health*<sup>146</sup> permitted a non-party reporter to refuse to answer deposition questions pertaining to her source. Although extending the privilege granted under the shield law to the reporter, the *Forest Hills Co.* decision carefully circumscribed the scope of section 2739.12. The Common Pleas Court for Licking County limited “the word ‘source’ to animate as opposed to inanimate objects.”<sup>147</sup> This construction precludes anything other than the identity of an informant from qualifying for the protection of the statutory privilege.

Because of its unique nature, the ramifications of *In re McAuley*,<sup>148</sup> the most recent Ohio Shield Law case, are still unclear. A defendant in a California criminal trial sought to compel the appearance of an Ohio reporter in his criminal proceedings by having the journalist deemed a material and necessary witness. His intention was to compel the reporter to disclose confidential information and identities of sources obtained during the preparation of an article. Although it affirmed the trial court’s finding that there was not sufficient evidence to establish that the reporter was a material and necessary witness, the appellate court proceeded to describe the nature of the Ohio Shield Law.

In its decision, the *McAuley* court characterized the statutory privilege as a conditional right not to reveal the name of a confidential source in either grand juries or criminal trials.<sup>149</sup> The news reporter’s conditional privilege must be balanced against the sixth amendment rights of a defendant on a case-by-case basis.<sup>150</sup>

After this statement, the *McAuley* opinion began to speak about the criminal defendant’s lack of an absolute right to either a reporter’s confidential information or sources. The court delineated the procedural mechanisms a defendant in a criminal proceeding must satisfy before he may compel the disclosure of a newsperson’s confidential information or sources.<sup>151</sup>

First, the defendant must show that the reporter or the source has relevant evidence concerning the defendant’s guilt or innocence. Second, the defendant must demonstrate that he has exhausted alternative sources. Finally, the defendant must review the journalist’s non-confidential material

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145. “The purpose of the statute is to encourage the flow of news from persons who might otherwise fear the unfavorable publicity or retribution resulting from the revelation of their name as the source of the news story.” *Forest Hills Util. Co. v. City of Heath*, 66 Ohio Op. 2d 66, 69, 302 N.E.2d 593, 596 (C.P. 1973).

146. 66 Ohio Op. 2d 66, 302 N.E.2d 593 (C.P. 1973).

147. *Id.* at 69, 302 N.E.2d at 596.

148. 63 Ohio App. 2d 5, 408 N.E.2d 697 (1979).

149. *Id.* at 22, 408 N.E.2d at 709.

150. *Id.*

151. *Id.* at 5–6, 408 N.E.2d at 700.

and request an *in camera* inspection by the court of the reporter's confidential material. The defendant is then entitled to the reporter's confidential material or the name of the confidential source if there is a reasonable probability that the sought-after material or identity "will provide relevant evidence of the defendant's guilt or innocence."<sup>152</sup>

The unsettling aspect of this approach is that the *McAuley* court failed to attribute the necessity of this process to either the Ohio Shield Law or the constitutions of the United States or Ohio. Nevertheless, the *McAuley* decision is extremely significant because it is the first time an Ohio court has extended any sort of privilege to a newsgatherer's confidential information as well as to the identity of confidential sources or has enunciated a procedural mechanism for resolution of conflicts between a newsman's conditional privilege and a criminal defendant's constitutional rights.

The *McAuley* decision may signal a trend of increasing protection of reporters' confidential material in Ohio courts. Because of the decision's failure to identify its source of lawful mandate, however, a newsgatherer's ability to conceal the confidential identity of sources and confidential information from judicial proceedings remains uncertain.

#### B. Recommendations

A reporter who wishes to protect the confidentiality of material within his possession currently finds himself in limbo. After *Branzburg v. Hayes* and subsequent decisions, he possesses some limited constitutional protection of uncertain dimension and application. The improbability of the enactment of a federal shield law<sup>153</sup> leaves state statutory privilege the most likely candidate for the strengthening of a news reporter's already battered shield.

Owing to the lack of litigation and controversy, there have been few instances that demonstrate the weaknesses and blindspots of the present Ohio Shield Law. Nevertheless, a look at other state statutes and their history should indicate the possible pitfalls awaiting inadequate and ambiguously written shield laws such as sections 2739.04 and 2739.12. The weaknesses of the Ohio newsman's privilege have not gone unnoticed. On January 18, 1978, Representative Dean Conley introduced House Bill No. 123 in the Ohio House of Representatives, with the intent of expanding the scope and protection of the current statutes.<sup>154</sup>

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152. *Id.*

153. Over the years, Congress has introduced numerous bills in an attempt to formulate a federal shield law. See, e.g., Murasky, *The Journalist's Privilege: Branzburg and Its Aftermath*, 52 TEXAS L. REV. 829, 842 n.46 (1974). See also Dixon, *Newsman's Privilege by Federal Legislation: Within Congressional Power?*, 1 HASTINGS CONST. L.Q. 39 (1974). In October 1980 the 96th Congress passed a law restricting searches and seizures of newsrooms, but there was no provision involving a reporter's testimonial privilege. See The Privacy Protection Act of 1980, Pub. L. No. 96-440, 94 Stat. 1879 (1980). Currently, there is no existing federal shield law.

154. H.B. 123, 113th Gen. Assembly (As Introduced), remained in the Ohio House of Representatives' Judiciary Committee from February 7, 1979, until the close of the session in December 1980. The closing of the session resulted in its death.

Sections 2739.12 and 2739.04 stand as barometers of Ohio's policy concerning the ability of news reporters to conceal the name of a confidential source. In strong terms, the shield law symbolizes the commitment the legislature has made to encouraging the free flow of information by facilitating the use of confidential informants. However, its lack of substantive protection serves to make it little more than a statement of general principles.

The scope of the statutory privilege must be broadened to reflect a more realistic view of the components of modern journalism. A shield law seeking to protect journalists' sources should not be limited to employees of radio and television broadcasters or newspaper and press associations. A contemporary newsman's privilege must include magazine and other similar periodicals of general circulation. By no means do newspapers and broadcasters hold a monopoly on the role of investigative reporting. Magazines and periodicals deserve a like ability to protect their source. *Deltec, Inc. v. Dun & Bradstreet*<sup>155</sup> demonstrates the courts' strict construction of the section 2739.12 privilege and their unwillingness to include the journalistic endeavors of magazines and periodicals within the parameters of the statute.

As many of the cases show, reporters will strive to gain entitlement to a state's shield law. The use of ambiguous terms with a variety of meanings exacerbates the difficulty of determining whether a reporter and his material are within the confines of statutory privilege. Ideally, a new Ohio Shield Law would include a definitions section. A determination of entitlement or eligibility is the first instance in which a reporter's attempt at concealing confidential information may be defeated by the courts. A definitions section would seek to detail to the court which newsgatherers and material the Ohio General Assembly sought to protect.

The scope of the Ohio newsman's privilege should be broadened to provide for the protection of confidential information as well as confidential sources. In many cases, the protection of confidential information is equally important. A source and his information may be so intertwined as to be inseparable.<sup>156</sup> The compelled disclosure of confidential information is no less an impairment to the journalist's newsgathering ability than the compelled disclosure of the information's source. Additionally, the procedure detailed below will provide for the defendant's acquisition of all necessary evidence.

After an expansion of the shield law's scope and the addition of definitions, the Ohio courts will be left with the limited first amendment right granted by *Branzburg* and the protection provided by the statutory privilege to be balanced against a criminal defendant's sixth amendment right or the needs of a party to a civil action.<sup>157</sup> This balancing occurs at the trial court

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155. 187 F. Supp. 788 (N.D. Ohio 1960).

156. See text accompanying notes 69-77 *supra*.

157. The statutory privilege is applicable to both criminal prosecutions and civil actions. As discussed earlier, the varying factor occurs in the weight given a criminal defendant's rights as opposed to a civil litigant's needs. See text accompanying notes 50-51 *supra*. Similarly, *Branzburg* does not preclude a reporter's assertion of a statutorily created privilege in the context of a grand jury investigation. It does, however, indicate that great weight will be given to the grand jury's needs. See text accompanying note 49 *supra*.

level, and a glance at the cases discussed in this Comment shows the diverse ways in which this balancing has been conducted.

An effective shield law requires procedural safeguards to ensure consistent and somewhat predictable balancing and determination of news-gatherer's privilege in various courts. A procedural mechanism resembling New Jersey's two-step process<sup>158</sup> should be preferred. The first hearing should involve a determination of the reporter's qualification as a news-gatherer under the shield law and the probable relevance of the material and identities sought. Finally, an *in camera* viewing by the court in the presence of the parties would serve to limit the breadth of the disclosed material to the minimum while preserving the rights of the party seeking disclosure.

*In re McAuley* raised the possibility of a similar process in Ohio. To effectively protect a journalist's privilege, such a proposed procedure must be uniformly followed. As aptly stated by Justice Frankfurter: "The history of liberty has largely been the history of observance of procedural safeguards."<sup>159</sup> Thus, specific procedural guidelines must be incorporated within the language of an amended Ohio Shield Law.

## V. CONCLUSION

Investigative reporting is vital to an informed society that makes a commitment to a free press. The use of secret sources is an inevitable product of controversial reporting, and anonymous informants provide the public with news that would otherwise remain unreported.

Journalists seeking constitutional protection of confidential sources find a first amendment shield of undefined dimension and limited effectiveness. The alternative available to some is state statutory shield laws.

As this Comment has disclosed, the efficacy of state shield laws varies. Inconsistent interpretations result in unpredictable outcomes, and the application of strict construction to the statutes succeeds in rendering negligible much of the laws' usefulness. A source who demands anonymity requests assurance from the reporter that his identity will remain confidential. The present confusion surrounding the newsmen's privilege robs the reporter of the ability to offer good faith assurances in order to continue obtaining clandestine information.

By enacting a state shield law, the Ohio legislature has evidenced a state policy that recognizes the value of confidential informants to newsgathering and demonstrates a willingness to confer upon reporters a conditional right of protection for their sources. Currently, the Ohio Shield Law suffers from the weaknesses associated with ambiguous language that lacks substantive direction; narrow construction and unforeseen application limit its utility for the

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158. See text accompanying notes 127-36 *supra*.

159. *McNabb v. United States*, 318 U.S. 332, 347 (1943).

practicing journalist. The statutory privilege should be revised to include a detailed definitions section. Additionally, the amended shield law should establish a procedural mechanism that would serve to protect the rights and needs of litigants and provide reporters with a workable privilege possessing identified parameters.

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